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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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Case No. 85-1529

In The Supreme Court of the United States

OCTOBER TERM, 1985

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

EDWIN LEES SHAW,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

Supplemental Brief of Petitioner

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RULE 28.1 LISTING

A complete listing in conformance with Supreme Court Rule 28.1 was included in the Petition for *Certiorari*.

ARGUMENT

I. Recent Decisions of The Fourth Circuit Court of Appeals Reinforce The Conflict Among The Circuits Which Should Be Resolved By This Petition

The United States Court of Appeals for the Fourth Circuit recently decided three cases which directly conflict with the holding of the Eleventh Circuit in this case. In *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir., May 27, 1986), *Dowd v. Textron, Inc.*, 792 F.2d 409 (4th Cir., May 27, 1986) (*cert.* applied for), and *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir., May 27, 1986), the Fourth Circuit Court of Appeals rejected the *Shaw* decision and held that "the government contractor defense shields the contractor from liability for design defects under either a strict liability or a negligence theory when the government has approved reasonably detailed specifications . . . ." *Tozer*, *supra* at 404. The Fourth Circuit thus has joined the ranks of all of the Circuits other than the Eleventh Circuit who have addressed the issue in following the test for the government contractor defense set forth by the Ninth Circuit in *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 711 (1984). The Fourth Circuit's decisions also emphasize that, contrary to the Respondent's suggestion, the Circuit conflict remains unresolved after this Court's decision in *U.S. v. Shearer*, U.S. , 105 S.Ct. 3039 (1985).

II. The Recent Fourth Circuit Decisions Reinforce The Need For This Court To Resolve The Important Question of Whether The Judiciary Should Second-Guess The Judgment of The United States Military In Approving The Design of A Military Weapons System It Has Selected For Use.

Petitioner's showing in its Petition that this Court should grant *certiorari* in this case to resolve the nationally important issue of whether the judiciary should be allowed to second-guess the judgment of the military in approving the design of a weapons system it has selected for use was not

rebutted by the Respondent in its response. The recent Fourth Circuit decisions in *Tozer*, *Dowd*, and *Boyle*, *supra*, all emphasize the dangers of the judicial second-guessing of military decisions engaged in by the United States District Court for the Southern District of Florida and affirmed by the Eleventh Circuit in this case. Addressing a very similar factual situation, the Fourth Circuit in *Tozer* stated that, "[i]t is difficult to imagine a more purely military matter than . . . the design of a sophisticated reconnaisance craft that was flying, on the day of Tozer's death, some 50 to 75 feet above the surface of the water at a speed of 500-550 nautical miles per hour." *Tozer*, *supra* at 405-406. *Tozer* specifically rejected the opinion of the Eleventh Circuit in this case, and held that courts should not make military judgments such as those made by the Eleventh Circuit in this case, whatever a plaintiff's theory of recovery. *Tozer*, *supra* at 406; *accord*, *Dowd*, *supra*; *Ellis*, *supra*.

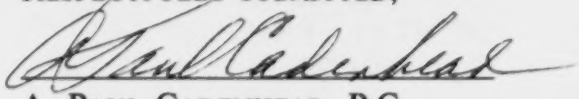
Since the record is clear that the design of the aircraft in this case was approved by the Navy, including the testing and approval of prototypes, *Shaw v. Grumman Aeorspace Corp.*, 593 F.Supp. 1066 at 1070-1071, ¶¶ 36 and 38 (S.D. Fla. 1984), that the Navy approved the design of the retrofit of aircraft with self-retaining bolts after several incidences attributable to the alleged design defect in this case in an effort to prevent future incidents, *id.* at 1073, ¶ 76, and that the Navy had over twenty years of experience with the aircraft at the time of the accident in this case, Grumman proved the military contractor defense as recognized by the Fourth Circuit in *Tozer*, *Dowd* and *Boyle*, and as followed by all of the Circuits which have addressed the issue. This Court should grant *certiorari* in this case to resolve the issue of judicial second-guessing of military decisions on the design of military equipment, which was first engaged in by the Eleventh Circuit in this case.

III. Conclusion.

For all of the foregoing reasons, as well as for the reasons set forth in the Petition for Writ of *Certiorari* and Reply Brief previously filed by Petitioner, Petitioner respectfully

requests that this Court grant *certiorari* to review the decision of the Eleventh Circuit Court of Appeals in this case.

RESPECTFULLY SUBMITTED,



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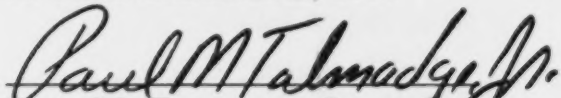
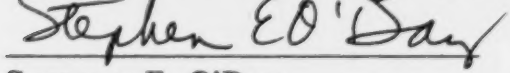


PAUL M. TALMADGE, JR.



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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court, and that three (3) copies of the foregoing SUPPLEMENTAL BRIEF OF PETITIONER were served on September 29, 1986, by United States Mail, first class, with proper postage prepaid and affixed, on all parties required to be served as follows:

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Dated this 29th day of September, 1986.

Paul M. Talmadge Jr.

PAUL M. TALMADGE, JR.